Nos. 91-464 and 91-491

FILED
NOV 18 1991
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In The
Supreme Court of the United States
October Term, 1991

CONSOLIDATED FREIGHTWAYS, INC.
and TEAMSTERS LOCAL 71,
Petititoners,

v.

HERMAN WALKER, BRADLEY COLESWORTHY,
TERA B. SLAUGHTER, and THOMAS DILLON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM IN OPPOSITION

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November 18, 1991

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MEMORANDUM IN OPPOSITION

STATEMENT

These petitions seek review of a judgment granting redress to a class of inter-city truck drivers for their union's breach of its duty of fair representation and their employers' violation of the collective bargaining agreement under which they were employed. The drivers had been persuaded to ratify a proposed collective bargaining agreement ("CBA"), in part because the employers had included a significant provision increasing their wages by basing pay for inter-city trips on actual mileage driven from one trucking terminal to another, rather than on mileage between points in each city bearing no relationship to the terminals' location. Although that change was to be effective within six months of ratification, the union lost interest in implementing the

drivers' victory, and the change in mileage was not implemented until nearly a year later.

When the drivers learned that implementation had been delayed, and that the employers would not make the pay based on the new mileages retroactive to the contractually required date, they filed suit. The district court imposed liability against the union on several grounds and ruled that the employer had breached the CBA by not implementing the new payment rules on schedule. The court of appeals affirmed, and rehearing and rehearing *en banc* were denied. Separate petitions have been filed by the employer and the union, but both should be denied, principally because the questions set forth in the petitions either are not properly presented by this case, would not alter the outcome even if they were resolved in petitioners' favor, and/or do not present questions on which the lower courts are divided.

A. Facts.

The members of petitioner in No. 91-464, Local 71 of the International Brotherhood of Teamsters ("IBT"), work under a CBA with several employers, including the petitioner in No. 91-491, Consolidated Freightways, Inc. ("CF"). The CBA consists of the National Master Freight Agreement ("NMFA") and the Carolina Freight Council Over-the-Road Supplemental Agreement ("Carolina Supplement"). Each of the respondents is a member of Local 71 who works for CF as a truck driver.

Most of the drivers' wages are determined, not by the number of hours they work, but by the number of miles they drive, multiplied by a mileage rate. The number of miles driven is not determined by comparing the truck's odometer reading before and after each trip; rather, a standardized chart is used that assigns a certain number of miles to each inter-city route covered by the company's drivers.

In May 1985, the CBA was renegotiated and submitted to the affected membership for ratification. The new Carolina Supplement included a new Section 3 in Article 52, which is at the center of this case. It required that, within six months of the CBA's effective date, the employers would pay drivers for the actual mileage they drove, from the gate of the terminal of origin, to the gate of the terminal of destination (thus the short-hand expres-

sion "gate-to-gate" mileage). In previous contracts, road drivers has been paid based on an *estimated* mileage between cities, known as "post-office-to-post-office" or "AAA mileage," because the "zero point" for many cities is located near the post office, and American Automobile Association figures were often used for guidance. In almost all cases, gate-to-gate mileage benefits the drivers by increasing the number of miles paid for each trip.

The drivers in Local 71 voted for the conversion to gate-to-gate mileage. Indeed, this provision was a popular and significant proposal that played an important role in securing membership ratification of the new CBA. In negotiating the provision, the union intended that gate-to-gate mileage would be effective, and drivers would be paid on the basis of it, by December 1, 1985.

However, despite this intended effective date, petitioners did not even meet to begin discussing the conversion process until September 9, 1985, almost four months after the May 1985 ratification. On that date, the Carolina Negotiating Committee appointed a subcommittee to calibrate the mileages, acknowledging the December 1 deadline for implementation and instructing the subcommittee to submit its mileage checks by November 20. Nothing further was done until October 21, 1985, when the first mileage measurements began.

Not surprisingly, given the late start, none of the gate-to-gate mileage adjustments were implemented on December 1, 1985. Respondent Walker began asking union officials when they would become effective, and whether adjustments would be made retroactive to December 1. When he failed to receive satisfactory answers, he sought to exhaust his contractual remedies by filing "class-action grievances," on behalf of all road drivers covered by the Carolina Supplement, on February 17 and 25, 1986.

While these grievances were pending, the Carolina Bi-State Grievance Committee met on March 20, 1986, and accepted the report of the mileage subcommittee of the Negotiating Committee concerning gate-to-gate mileage. Ken Bowman, a Local 71 officer who was Walker's representative in connection with his grievances, was a member of that grievance committee and joined in the conclusion that "the mileages are accepted as submitted and shall be effective May 4, 1986," which was more than five months later than the contractual deadline, and six weeks after the

report was accepted.

In May 1986, after respondent Walker learned of the March 20 decision to delay gate-to-gate mileage, he filed a third grievance, requesting retroactive implementation of the mileage adjustment to December 1, 1985. This grievance was not heard until September 16, 1986, at which time it was consolidated with the February grievances, and all three were denied.

There is an important difference between Teamster grievance committees, such as the one that denied Walker's grievances, and the arbitrators for which most non-Teamster CBA's provide. If a grievance cannot be resolved by the union and employer representatives on the Bi-State Committee, two options are available. First, certain grievances may be referred by a majority vote of the committee (that is, union and employer representatives must agree) to an arbitrator, who is forbidden by the terms of the CBA from modifying the CBA. Second, failing such a majority vote, the parties are free to use self-help -- a strike or a lockout -- to force the other side to agree. The Bi-State Committee, unlike the arbitrator to whom the Committee may refer grievances, is not limited by the CBA to interpreting or applying the CBA; it may even decide to change the CBA if that is the best way to reach agreement and avoid a strike.

Although the CBA itself permits the Bi-State Committee to agree to amend the CBA, there is another agreement that imposes a significant limitation on the discretion of that Committee. The IBT Constitution provides that a CBA must be approved by the affected members before it can be effective, and that right includes not only the adoption of a CBA, but applies to amendments as well. Article XII, Section 1(b) (local contracts); Article XVI, Section 4(a) (regional and national contracts). In the past, Local 71 had invoked these constitutional provisions to require ratification votes on matters as obscure as a change in the lunch hour for loading dock workers. However, the union never called for a vote by the drivers on the five-month delay in converting to gate-to-gate mileage.

B. Proceedings Below.

This case was filed as a class action in the United States District Court for the Western District of North Carolina on

October 14, 1986. After a three-day trial on the issue of liability in May, 1988, the trial court granted judgment in favor of respondents on May 8, 1989, issuing findings and conclusions that are reported at 714 F. Supp. 178.

The district court found that the union had violated both its duty of fair representation ("DFR") and respondents' equal right to vote on contract changes under Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The DFR was breached in several ways: by failing to seek timely implementation of the mileage changes, by repeatedly delaying the submission of respondent Walker's grievance pertaining to the timing of the changes, by failing to raise the issue of timing during the meetings of the Negotiating and Grievance Committees, by negotiating away the six-month deadline for mileage changes without receiving anything for the members in return, and, in light of the finding that the contract had been amended and not just interpreted, by consenting to the amendment without submitting it to the membership for ratification, as required by the IBT Constitution. The equal right to vote under section 101(a)(1) of the LMRDA, 29 U.S.C. §411(a)(1), was violated because other Teamster members had been accorded the right to vote on midterm modifications under this and other CBAs, but the union had refused to allow this issue to be voted on by respondents and other members of Local 71.

Turning to the contract question, the court noted that the contract expressly required the union and the employers to implement mileage changes by December 1, 1985. In defiance of this clear contractual language, which the bargaining history revealed was plainly intended to be applied to all gate-to-gate mileage recalibrations, the court found that petitioners had invented a spurious distinction to cover up their own delays in making the conversion to gate-to-gate mileage. Despite its numerous findings that the DFR had been violated, the district court acknowledged the strict standard for judicial review of arbitration decisions set forth in *Paperworkers v. Misco*, 484 U.S. 29 (1987), CF Pet. App. 29a, 30a, and applied that standard in deciding whether or not the employer had violated the CBA. In sum, it ruled that the CBA's language and negotiating history were so clear that the change in the effective date was a modification of the CBA, to which *Misco* does not apply, rather than an

interpretation of it.

The court of appeals affirmed the judgment of liability of the district court, although it narrowed the class entitled to benefit from it, a ruling that is not presented to this Court. Like the district court, it acknowledged that *Misco* forbids courts from disturbing arbitral decisions that draw their essence from the CBA, even if the court concludes that the arbitrator "has seriously misconstrued" the CBA. CF Pet. App. 57a-58a. However, the court found that the decision here went beyond interpretation to modification of clear contractual language because Section 3 "unequivocally states" that mileages were to be implemented within six months of the CBA's effective date, the lead time being provided to allow time to recalculate the mileages. Indeed, the mileage report did not make any request for interpretation of the agreement; rather, the grievance committee adopted the May 4 effective date out of the blue. This decision, the court concluded, did not draw its essence from the agreement, and so could not stand. CF Pet. App. 58a.

Local 71, the court agreed, had violated its DFR in a number of ways. First, Local 71 representative Bowman -- the very individual who was supposed to be representing respondents on their class action grievance seeking a December 1 effective date -- had joined in the March 20, 1986 committee decision, without even attempting to make an argument that the pay for gate-to-gate mileage should be retroactive to December 1, 1985. CF Pet. App. 58a-59a. Second, the local had failed to make diligent efforts to seek timely implementation of the mileage conversion provisions; had not submitted the changed effective date to the membership for approval; and had, indeed, delayed its prosecution of respondents' grievances, while simultaneously acquiescing in the new implementation date. "Each of these grounds supports a claim of breach of duty to fairly represent. . . . We find the evidence sufficient to support the district court's conclusions; therefore, we cannot overturn on appeal." CF Pet. App. 59a-60a. In light of these findings of violation of the DFR, the court did not reach the alternative ground given by the district court for holding against the union, the violation of the LMRDA's equal right to

vote.[1]

REASONS FOR DENYING THE WRIT

1. In No. 91-491, CF has sought this Court's review only of the question whether the court below applied the proper standard for reviewing arbitration decisions. In the course of arguing for review, CF suggests that, if the lower courts properly applied the *Misco* test, this Court should change the standard to make it even more deferential than the existing rule, first enunciated in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), that an arbitration award should be overturned if it does not "draw its essence from the CBA."

However, in a hybrid case such as this one, the case of the employees against each defendant consists of proving both that the DFR has been breached and, once that is shown, that the CBA was violated. The elements of the claim remain the same whether suit is brought against the employer alone, or against both the employer and the union. *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983). Ordinarily, an arbitration decision is final and binding against all parties, and can only be overturned under the

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[1] Petitioners had argued that the seven-month delay in processing respondents' grievances was caused in part by the illness of business agent Bowman in March and April 1986. But this illness did not prevent Bowman from sitting on the Bi-State panel that adopted the mileage subcommittee's report on March 20, 1986. Although he was supposed to be Walker's representative on the effective-date grievance, Bowman never mentioned that pending grievance, or the December 1 effective date, while the mileage committee report was being considered. Moreover, the mileage subcommittee had been established by the Negotiating Committee in response to a grievance filed by Charles Williams, a member of Local 391, which did not raise the issue of the effective date, presumably because December 1 was still a realistic possibility. Williams filed his grievance on September 4, 1985, and it was considered by the Negotiating Committee only five days later, on September 9, 1985. In other words, the union was capable of obtaining a quick meeting and decision when it wanted one, but made no efforts to get one on respondents' grievance. Moreover, the adoption of the new effective date was made in connection with a grievance that did not address the issue, and that decision was then cited back as a reason for denying respondents' argument about effective dates, on the ground that the decision had already been made. These manipulations formed part of the basis for the DFR findings, affirmed below, that are not challenged in the petitions.

standards set forth in *Enterprise Wheel*, and reaffirmed in *Misco*. Once a DFR breach is established, however, the employee need not overcome the *Misco* standard in order to prevail on the CBA question; rather, at that point the arbitration decision is no longer final and binding, *Hines v. Anchor Motor Freight*, 424 U.S. 554, 572 (1976), and the court then considers whether the employer's action was "erroneous" under the CBA. *Id.* at 572. The alleged violation of the CBA is then considered *de novo*, as an arbitrator would have done had the union not breached its DFR in the course of the grievance procedure.

a. Here, CF has not sought the Court's review of the conclusion below that the union breached its DFR in handling respondents' grievance concerning the implementation date for the mileage conversions; the findings below of DFR breach have all become final, at least as against CF. Thus, even if CF were correct that the standard applied here to the review of arbitration decisions that are final and binding was too permissive, because the *Misco* standard needs to be tightened as the employer suggests, the fact remains that, in light of CF's failure to contest the DFR findings, the joint committee decisions here are *not* final and binding, and CF was entitled to no more than a *de novo* review of the question of CBA interpretation; the review below under *Misco* standards, even if not sufficiently exacting, was more than CF was entitled to have. In those circumstances, the question of what standard should apply to judicial review of Teamster grievance determinations, including CF's argument for a revised standard of review, is not presented in No. 91-491, and CF's petition for a writ of certiorari should be denied for that reason alone.

b. The union, in ~~No. 91-464~~, has attacked both some of the DFR findings and the standard of review applied by the court below, but it has failed to draw into question all aspects of the DFR findings below. The court of appeals expressly upheld the determination of the district court that the union breached its DFR by "(1) failing to seek timely implementation of the provisions of the 1985 contract in a diligent fashion . . . and (3) delaying Walker's grievance while simultaneously acquiescing in the new implementation date." Union Pet. App. 59a. However, petitioner Local 71 only attacks the two other DFR violations upheld by the court of appeals -- the conduct of union representative Ken Bowman on

the March 20 committee, and the failure to submit the contract modification to the membership for ratification. *Id.* 59a. By limiting its challenge to those two holdings, petitioner Local 71 has allowed the other two DFR findings to become final against it, just as CF has allowed all the DFR findings to become final against itself. And, because of the findings of breach of the DFR, the courts were required to determine the contract question *de novo*, and neither petitioner was entitled to rely on the ruling of the joint grievance committee, let alone to give it any special deference.

Accordingly, like the similar question on which CF has sought review, this question set forth by Local 71 is simply not presented here. Even a reversal by this Court on the two DFR questions raised in the union's petition would not affect the outcome of the case, because Local 71 will remain liable for its breach of DFR on the two grounds not attacked in the petition. Under these circumstances, there is no reason for this Court to grant review since the outcome below cannot be changed based on the limited issues raised in the petitions.[2]

c. There is another defect of jurisdictional proportions in petitioners' effort to secure review of the aspects of the decision below that treated the change in the effective date as a contract modification rather than as an interpretation. Both petitions assume that the decision on the contract was made by a joint "grievance" committee, which, in turn, they treat as being tantamount to an arbitrator. In fact, the decision to change the effective date was not made by the parties' "grievance" committee, but rather by their "negotiating" committee.[3]

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[2] Even if all the DFR claims were resolved favorably to Local 71, it would still have to obtain reversal of the district court's LMRDA ruling, which the court of appeals did not specifically address. Since that ruling is so plainly correct, this presents another reason for this Court to deny review.

[3] Thus, it was the Negotiating Committee that made the basic decision that not all conversions would be completed by December 1, 1985, although technically it made that decision in the context of a "grievance." The Negotiating Committee then created a subcommittee that worked out all the mileage disputes; it was that Negotiating subcommittee that made all the substantive decisions. By the time the

(continued . . .)

There is no authority whatsoever that union and employer negotiators are entitled to any deference whatsoever in their construction of the CBA or in their resolutions of disputes about the workplace. Where, as here, the parties substituted the Negotiating Committee, which is not empowered to decide grievances, but only to propose contracts for possible ratification, for the Grieveance Committee, which is generally charged with applying the CBA, the courts should not accord the substitute the kind of deference that the proper committee might be given. Because the questions presented both depend on the assumption that the decisions in question were made by a "grievance committee" that is tantamount to an arbitrator, there would be no basis to decide those questions given the fact that it was a negotiating committee, not a grievance committee, let alone an arbitrator, that was responsible for the decisions here.

2. In addition to the reasons given above, there are other grounds to deny the standard of review questions presented in both petitions. The employer petitioner, No. 91-491, in effect concedes that the standards of existing law were met, but asks the Court to review this case in order to modify those standards to make it virtually impossible to overturn an "arbitration" decision. The union petitioner, by contrast, argues in No. 91-464 that the court below failed to apply the existing standard of review insofar as it considered respondents' contentions about the CBA before it considered the analysis of the CBA purportedly set forth by the "arbitral" body.

Taking the employer objection first, the contention that there is a massive problem in the courts of appeals with respect to

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(. . . continued)

March 20 grievance committee meeting was held, according to the employer chairman of the negotiating committee, there was "no controversy before the March 20 committee because the [negotiating] committee had ironed it out, and we were making it a part of the official record." Ct. App. JA 472. The fact that this negotiated compromise was ratified by the grievance committee does not change the fundamental facts that the decisions were made by the union and employer representatives on the negotiating committee, and that the union and employers freely substituted one committee for another, in making their mutual decision to delay implementation of the mileage conversion beyond the date that had been approved by the membership in voting to ratify the CBA.

the application of the standard of *Misco* and *Enterprise Wheel* is unpersuasive. Petitioner bases its request on the opinions of dissenting appellate judges in two fact-bound cases, *IBEW Local 429 v. Toshiba America*, 879 F.2d 208 (6th Cir. 1989), and *Delta Queen Steamboat Co v. MEBA District 2*, 889 F.2d 599 (1989), *reh. den.*, 897 F.2d 746 (5th Cir. 1990), each of which contends that the majority opinion there is, on the facts of that case, insufficiently deferential in considering the arbitral outcome. Petitioner then seeks to generalize from these dissents to the proposition that the courts of appeals have not accepted the lessons of *Misco*. In fact, there is no common theme between *Toshiba* and *Delta Queen*, or, indeed, between those cases and this one, except for the fact that, in each case, there is a dissenter who thinks that the majority incorrectly applied existing law. Three cases do not make any epidemic of disregard for *Misco*. There is no genuine disagreement among the circuits about the manner in which *Enterprise Wheel* and *Misco* should be applied, and no need for this Court to address the proper standard again, in this case or otherwise.

Apart from the lack of genuine conflict among the lower courts, the proposition that petitioner CF would have the Court adopt goes too far in the direction of insulating arbitral misconduct from review. According to CF, an arbitration award should be upheld if there is any conceivable basis on which an arbitrator could have reached the particular result, even if it is apparent from review of the arbitral determination that the arbitrator "applied his own brand of industrial justice" rather than basing his decision on the CBA. In those circumstances, however, the parties have not obtained what they bargained for: an arbitral construction of their contract. The fact that an arbitrator (in this case, actually, a Teamster joint committee) might have reached the same result had he applied the contract rather than some other basis for decision does not change the fact that *this* arbitrator did not do so, and the party that lost before the arbitrator should not be saddled with the decision simply because a fair arbitrator might have reached the same result. Here, the court below concluded, after a careful review of the record, that what the joint committee did was modify the existing agreement, based on their notions of what ought to be agreed to, rather than simply applying the existing agreement, and such a modification, without a new ratification vote, was not what the respondents here

bargained for.

Nor is there any general disagreement among the courts of appeals about the issue presented by petitioner union in No. 91-464: whether it is appropriate to consider the arbitrator's rationale before addressing the contentions of the plaintiff who is attacking the arbitral outcome. More fundamentally, petitioner's contention about the proper order of consideration is trivial. Obviously, when a plaintiff brings a case attacking an arbitral outcome, both the plaintiff's contentions and the arbitral outcome will have to be analyzed, and it makes no difference which is analyzed first. Here, acknowledging the highly deferential standard of review that obtains under *Misco*, the court below decided that respondents' argument for a December 1, 1985, effective date was not just a better view of the contract, but was the only rational view of the contract, and there was simply no basis in the language or negotiating history of the CBA for the proposition that the conversion was to be effective on May 4, 1986. It is that underlying conclusion, and not the order of consideration, that is significant.

Indeed, in the circumstances of this case, it would have been difficult to consider the rationale of the "arbitration" committee before considering the analysis advanced by respondents, for the simple reason that the committee gave no explanation for its decision: it simply announced its outcome. The elaborate rationales advanced in the petitions are no more than post-hoc explanations invented by counsel solely for the purpose of litigation, and the courts below were certainly not obligated to treat those rationales with the deference that would have been due to the explanations of an arbitrator.

The employer's contention about the CBA, stripped to its essentials, is that there was a conflict between Section 2 and Section 3 in Article 52. The argument continues that the union, believing that the real advantage to be gained by its members lay in securing a review of the "trunk" mileage whose recalibrations were arguably governed by Section 2, traded away the prompt conversions demanded by Section 3 and required only "spur" calculations in return for relatively quick, but non-retroactive, recalculations of all mileage combinations involving both spurs and trunks. We agree with the determinations of the courts below that this argument was a post-hoc invention of counsel that does not draw its essence from the CBA. However, it is important to

note that even this argument assumes that the union agreed to modify the six-month requirement of Section 3 in order to obtain a valuable benefit for the membership. The flaw in the argument, of course, is that membership ratification would have been required under the IBT Constitution even for this mid-term modification, whether it was beneficial or not. In the Teamster union, it is the affected membership, not the leadership, that decides whether the proffered benefit was worth the change in the CBA. Accordingly, even on petitioners' strongest argument, there was an admitted modification of the CBA, and the decisions below would have to be affirmed.

3. In No. 91-464, the union petitioner also seeks the Court's review of the determinations below that the union breached its DFR by virtue of the conduct of one of its representatives on the March 20 committee (Question 1), and by failing to submit the contract change to the membership for ratification (Question 2).

a. On Question 1, petitioner first argues that the decision below violates arbitral immunity in some respect. Of course it does not; it is only the union that has been held liable, not the "arbitrator," in this case for the conduct of one of its agents, just as, for example, a municipality may be held liable under 42 U.S.C. § 1983 for the misconduct of one of its agents, even if the agent is immune from personal liability. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

On the question of union liability, petitioner cites a number of cases that have held that union representatives on joint grievance committees do not have a DFR. The court below did rely on the proposition that union representatives on joint committees do have some DFR obligations to support one of the four bases for finding a breach of the DFR, and we do not deny that this is an important question that the Court may ultimately wish to resolve. There are, however, two ways in which the decision below is factually idiosyncratic, and thus not a proper vehicle for addressing that question.

First, there is no conflict among the lower courts about the proposition that members of Teamster/employer committees that *modify* a CBA do have a DFR. The decision below is in accord with the only other reported decision of which we are aware on this point: *Warner v. McLean Trucking Co.*, 574 F. Supp. 291, 299-300 (S.D. Ohio. 1983).

Second, this case is atypical in that Ken Bowman, the Local 71 representative on the March 20 committee, was the very same individual who was supposed to be pursuing respondents' grievance over the proper effective date for implementing the new gate-to-gate payment system. Whether or not union representatives on grievance committees should generally be subject to the DFR is an important question on which there may be legitimate grounds for differences of opinion. However, whether a representative who participates in committee consideration of the very issue on which he has accepted the role of an advocate is an easy question on which there can be no doubt: such a representative can not rid himself of his obligation to the grievant, which is simply to refrain from arbitrary refusals to advocate that position, as Bowman did here.

b. As to the union's Question 2, there is no significant division of authority concerning its obligation to permit members to ratify a contract modification *where the union's governing documents so require*. The IBT Constitution contains such a requirement, and every court to consider the matter has found a breach of either the equal right to vote, or the DFR, or both, when the union fails to submit a mid-term contract modification or reopener for ratification, especially where other contract changes, of far less significance, are routinely put to a vote. *See Sako v. Teamsters Local 705*, 125 LRRM 2372 (N.D. Ill. 1987); *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984), *app. dism.*, 119 LRRM 2247 (D.C.Cir. 1985); *Parker v. Teamsters Local 413*, 501 F. Supp. 440 (S.D. Ohio 1980), *aff'd mem.*, 657 F.2d 269 (6th Cir. 1981); *Conroy v. Teamsters Local 705*, 124 LRRM 3240 (N.D. Ill. 1985). There is no reason to grant review of this question, either in this case or in the future.[4]

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[4] The text of the union's petition, which exceeds the 30 pages permitted by Rule 33, attempts to introduce numerous issues that are not included in the Questions Presented. Because the Court would not have jurisdiction to consider those issues, we do not address them.

CONCLUSION

The petition for a writ of certiorari should be denied.

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